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No. 09-1478

Supreme Court, U.S.
FILED
DEC 29 2010
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deputy Sheriff,
Deschutes County, Oregon
Petitioner,

v.

SARAH GREENE, et al.
Respondent.

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing as the authorized law officer of the county, and on behalf of the California District

Attorneys Association, the National District Attorneys Association, and the Arizona Prosecuting Attorneys' Advisory Council[1], pursuant to Supreme Court Rules 37.2(a) and 37.4.[2]

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1. None of these parties (the California District Attorneys Association, the National District Attorneys Association, or the Arizona Prosecuting Attorneys' Advisory Council) authored this brief either in whole or in part, and none of them made monetary contributions to fund the preparation or submission of this brief.

2. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

In addition, on November 10, 2010, counsel for both the Petitioner and the Respondent filed consents in this Court to the filing of amicus curiae briefs in support of either or neither party. *Supreme Court Docket* no. 09-1478.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association

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has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) was created in 1973. Its primary mission is to provide education, training, and a variety of other services to prosecutors. It is composed of 22 members, including the state attorney general, the 15 elected county attorneys, four municipal prosecutors, a representative of the Arizona state supreme court, and the dean of the state's two law colleges.

INTEREST OF AMICI CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a compelling interest in protecting children and ensuring their safety and in the prompt and effective investigation and prosecution of suspected child abuse.

Los Angeles County governmental agencies conduct a large number of child abuse and neglect investigations. *The State of Child Abuse in Los Angeles County*, prepared by the Los Angeles County's Inter-Agency Council on Child Abuse and Neglect (ICAN), reported the following data for 2008 among various county agencies.[3] The Department of Child and Family Services received 166,745 referrals of child abuse or neglect, including 52,242 referrals for sexual and physical abuse and severe neglect. ICAN Report at 161. Law enforcement agencies conducted over 35,000 investigations.[4] Prosecutors filed over 3,400 cases. *Id.* at 119, 283.[5]

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3. Los Angeles County Inter-Agency Council on Child Abuse and Neglect, *The State of Child Abuse in Los Angeles County* (April 2010) <http://ican.co.la.ca.us/data_loads.htm (ICAN report).

4. The Los Angeles County Sheriff's Department had 3,170 cases reported by station. ICAN Report at 389. The Juvenile Division of the Los Angeles Police Department conducted 27,454 investigations (criminal and non-criminal). *Id* at 39. Other independent police agencies reported a total of 5,437 investigations. *Id* at 54-55.

5. These numbers reflect statistics supplied by the Office of the District Attorney and the Office of the Los Angeles

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In Los Angeles County, coordination of child abuse investigations and interviews of child victims are encouraged.[6] A significant number of these investigations include interviews of suspected victims in their schools, particularly if the suspected abuser is a household member. California law specifically allows police investigators and government social workers who are investigating child abuse and neglect to conduct these interviews at school. Cal. Penal Code § 11174.3 (Deering 2010).

The Ninth Circuit held in *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), that a government official

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City Attorney. The other nine city attorneys' offices in Los Angeles County that prosecute misdemeanor offenses did not report referral and filing statistics.

6. Los Angeles County Inter-Agency Council on Child Abuse and Neglect, *Los Angeles County Child Abuse and Neglect Protocol* (August 2009)<http://www.ican4kids.org/documents/LACounty_Child_Abuse_and_Neglect_Protocol.pdf> (ICAN Protocol). The ICAN Protocol serves as a guide to the recommended practices for the identification, reporting, investigation, case management and prosecution of child abuse and neglect cases, including a preference for coordinating efforts so that providers will "lessen emotional trauma to the victims occasioned by repeat interviews ... and other governmental interventions" and "promote inter-agency investigation and case management." ICAN Protocol at vii, 1. Specific recommendations include a multi-disciplinary approach and coordinated interviews. *Id* at 9, 34.

must have a warrant, court order, parental consent, or exigent circumstances before "seizing" a child at public school to conduct an interview regarding suspected abuse. The Ninth Circuit's per se holding that all public school interviews of children regarding suspected abuse are "seizures" within the meaning of the Fourth Amendment is a gross mischaracterization with very serious consequences. Requiring a warrant, court order, parental consent, or exigent circumstances before any child may be interviewed at school regarding suspected abuse, hampers the efforts of law enforcement officers and prosecutors to promptly and effectively investigate and prosecute child abuse and most importantly, hinders the performance of their duty to protect children and ensure their safety.

SUMMARY OF ARGUMENT

Clearly, not every encounter with a police officer triggers the Fourth Amendment. Generally, the Fourth Amendment is implemented only if the encounter could be described as a "seizure" or a "search." An encounter with the police that is not a seizure is described as a "consensual encounter." Such an encounter does not need to be justified under the Fourth Amendment. An objective or reasonable person test determines whether a seizure has occurred.

An interview of a child at a public school conducted to determine whether that child is a victim of child abuse or sexual molestation is not a seizure because when an officer questions a child about the child's possible victimization, there is nothing to suggest that the child would not be free to leave, free to move, or free to simply ignore the questions.

The fact that, in the interests of privacy, a child is moved from a classroom to a school office for the interview makes no difference: children are regularly directed to move from place to place at school, making the interview no more intrusive than the child's daily experience at school.

The fact that the officer involved is armed is also of no consequence: it is common knowledge that police officers carry weapons as part of their uniform; and it is not objectively reasonable for a crime victim to believe that a police officer would shoot her if she ignored questions regarding her victimization. Police officers do not shoot or otherwise harm child victims who fail to disclose information about crimes committed against them.

The fact that the interview lasts an hour, even two, is also insignificant: there is an art to interviewing crime victims, particularly child victims, which involves taking the time necessary to make the child at ease by starting with comfortable questions and to get to know the child before asking about the suspected abuse or molestation. These factors do not transform a consensual encounter into a seizure of the victim that implicate the Fourth Amendment.

The purpose of the interview, to protect children who are suspected victims of crime, rather than gather evidence to assist in their criminal prosecution, is also a significant factor. Questioning victims and witnesses to help solve and prevent crime is not the same as questioning a suspect to prosecute him for a crime. The constitutional rights of victims and witnesses are no less important than those of a suspected criminal. However, the fact that the purpose of a victim interview is to

benefit the victim is an important consideration in determining whether an encounter constitutes a seizure.

ARGUMENT

I. THIS COURT MAY CONSIDER AN ISSUE NOT RAISED DIRECTLY BY THE PARTIES BUT RAISED IN AN AMICUS BRIEF

In this case, the Ninth Circuit adopted, without providing any analysis whatsoever, the district court assumption that an in-school interview of a child victim regarding suspected abuse was a seizure. None of the parties have thus far directly addressed this issue.

In general, only those issues raised by the parties or fairly included in raised issues will be considered by the Supreme Court. Sup. Ct. R. 14(1)(a). However, this Court need not always strictly adhere to this rule. Indeed, this Court may consider an issue not raised directly by the parties but raised in an amicus brief. *See Teague v. Lane*, 489 U.S. 288, 300 (1989).

Accordingly, amici urge this Court to address the issue of whether an in-school interview of a child victim regarding suspected abuse is necessarily a seizure. Amici assert that the issue is fairly included, though not directly raised, in the issues stated by the parties. Moreover, even if this Court finds that the issue was not fairly included within those issues raised by the parties, it has been raised by an amici. *Teague*, 489 U.S. at 300.

II. AN INTERVIEW OF A CHILD AT A PUBLIC SCHOOL REGARDING SUSPECTED ABUSE IS NOT A "SEIZURE" PER SE UNDER THE FOURTH AMENDMENT BECAUSE OBJECTIVELY WHEN A POLICE OFFICER QUESTIONS A CHILD WHO IS A SUSPECTED *VICTIM*, NOT A SUSPECT HERSELF, THERE IS NOTHING WHICH AUTOMATICALLY CONVEYS THAT THE CHILD IS NOT FREE TO LEAVE OR MOVE OR IGNORE THE QUESTIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

This Court has examined, in various contexts ranging from the city street, to airports, to the workplace, to buses, and to the country's borders, the question of whether police questioning amounts to a "seizure" prohibited by the Fourth Amendment. In a long line of cases, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has held repeatedly that police questioning itself is not a seizure and that for a seizure to reach constitutional magnitude, a restraint of liberty must be involved.

In *Terry*, Officer McFadden observed three men engaging in conduct which appeared to him, on the basis of his training and experience, to be the "casing" of a store for a likely robbery. *Terry*, 392 U.S. at 7. He

approached the men, identified himself, asked for their names, and failed to receive a prompt response, except from Terry who mumbled something. *Ibid.* Officer McFadden grabbed Terry and patted down the exterior of his clothing, recovering a gun. *Ibid.* Chief Justice Warren stated that the Fourth Amendment was applicable "whenever a police officer accosts an individual and restrains his freedom to walk away." *Id.* at p. 16. However, this Court also went on to hold that a police officer may walk up to anyone on the street and ask a question without running afoul of the Fourth Amendment. *Terry*, 392 U.S. at 22-23. "Not all personal intercourse between policemen and citizens involves 'seizures' of persons and only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19, fn.16. Thus, *Terry* essentially recognized two ways in which an officer may seize a person: by physical force or by show of authority (so called "mental" detention). Either way, based upon *Terry*, a restraint on liberty was necessary in order to find a seizure implicating the Fourth Amendment.

Twelve years later, Justice Stewart, in *United States v. Mendenhall*, 446 U.S. 544 (1980), first proposed a reasonable standard: that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall* held that no seizure had occurred when police agents approached respondent on a public concourse of an airport, asked her if she would show them her ticket and identification, and posed a few questions to her. *Id.* at 555. Justice Stewart listed four

circumstances "that might indicate a seizure even where the person did not attempt to leave: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers' request might be compelled." *Id.* at 554. Justice Stewart stated that, in the absence of some such evidence, as in *Mendenhall*, otherwise inoffensive contact between a member of the public and the police, cannot, as a matter of law, amount to a seizure of that person. *Id.* at 555.

Following *Mendenhall*, *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion), held that respondent, a nervous young man who paid cash for an airline ticket from Miami to New York under an assumed name and carried heavy suitcases, could be stopped by police and temporarily detained while the police investigated whether he was a drug courier. *Id.* at 494. A seizure occurred only once the officers had asked him to accompany them to a small room, retained his ticket and identification, and indicated that he was not free to leave. *Id.* at 504. However, in so holding, this Court still recognized that mere police questioning does not constitute a seizure, explaining that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answer to such questions." *Ibid.*

Florida v. Rodriguez, 469 U.S. 1, 4-6 (1984) (per curiam), held that an officer asking respondent in an airport lobby if they might talk and suggesting that they

move 15 feet away in order to talk, was not conduct that rose to the level of a seizure. This was "the sort of consensual encounter that implicate[d] no Fourth Amendment interests." *Ibid.*

No seizure occurred when INS agents seeking to identify illegal aliens conducted work force surveys inside a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees. *INS v. Delgado*, 466 U.S. 210, 220-221 (1984). This Court specifically rejected the argument that the blocked exits turned the incident into a seizure, stating instead that since respondents were free to go about their own business in the workplace after a question was put to them, respondents were not in fact detained. *Id.* at 220. The majority, in an opinion written by Justice Rehnquist, reasoned that "ordinarily when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by [their] voluntary obligations to their employers. *Id.* at 218. Although some disruption was caused, including the efforts of some workers to hide, workers were not prevented from moving about the factory. *Id.* The stationing of agents by the doors did not change the result because the purpose was to insure that all persons were questioned: "If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits." *Id.* at 218, (footnote omitted.) Since most workers could have no reasonable fear that they would be detained upon leaving, no seizure of the work force as a whole occurred. *Id.* at 219. This Court also reasoned as follows:

> While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Unless circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

Id. at 216-217.

In *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988), no seizure occurred when police officers in a squad car drove alongside a suspect who turned and ran down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, displaying of a weapon, or blocking of the suspect's path), the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon his freedom of movement." *Ibid.* (footnote omitted.) To be a seizure, more was needed: "The record does not reflect that the police activated a siren or flashers; . . . or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement." *Ibid.*

In *California v. Hodari D.*, 499 U.S. 621, 629 (1991), this Court held that even an actual chase did not amount to a seizure because the suspect failed to comply

with the officer's order to stop. A Fourth Amendment "seizure" of a person is the same as a common law arrest and there must be either application of physical force (or the laying on of hands) or submission to the assertion of authority in order to constitute a seizure. *Id.* at 626, fn. 2.

In *Florida v. Bostick*, 501 U.S. 429, 431-432 (1991), police officers, conducting a "bus sweep" aimed at detecting illegal drugs and their couriers, boarded a bus to inspect tickets and identification of selected passengers. This Court began its analysis with the observation that since *Terry*, it had repeatedly held that mere police questioning was not a seizure. *Id.* at 434. The fact that Bostick did not feel free to leave the bus did not mean that the police had seized him. He was a passenger on a bus that was soon to depart, such that his movements were "confined" regardless of the conduct of the police officers. *Id.* at 435-436. This case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS "survey" at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct – i.e, by his being a passenger on a bus." *Id.* at 436. Accordingly, the appropriate inquiry in determining whether a seizure had occurred was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.*

Activating flashing lights on a patrol car has been held to be a seizure. *Michigan v. Chesternut*, 486 U.S. at 575. However, only in *Florida v. Royer* did a majority hold that a seizure occurred short of a physical restraint, and the facts of that case significantly resembled a physical seizure: by retaining Royer's

driver's license, airline ticket, and luggage, the police essentially controlled his ability to travel. *Id.* at 494.

The Ninth Circuit opinion fails to consider the principle that mere police questioning is not a seizure because a seizure involves physical or mental restraint or termination of movement. An interview of a child at a public school by a police officer regarding suspected child abuse, which does not involve any restraint, physical or otherwise, is not a seizure and all such interviews do not violate the Fourth Amendment. Simply stated, a seizure did not occur in the case.

As in this case, the fact that a child is moved from the classroom to another room at the school in order to conduct an interview, does not turn the encounter into a seizure. Like the workers in *Delgado* and the man on the bus in *Bostick*, a child's freedom of movement is seriously impacted at school in ways that are independent of any kind of police conduct: on the one hand, a child must go where she is told regardless of police presence; on the other hand, irrespective of police presence, a child must stay where she is told. Consequently, the fact that a child is moved from one room to another in order to effect an interview does not turn an in-school interview of a child into a seizure: the movement is no more restrictive or intrusive than an ordinary experience at school every day. In fact, moving the child to another room should be encouraged in order to protect her privacy.

The Ninth Circuit in this matter placed particular emphasis on the fact that the sheriff was armed. *Greene v. Camreta*, 588 F.3d at 1027-28. This fact does not turn an in-school interview of a child regarding suspected abuse into a seizure. When an adult suspect is detained on the streets by an armed police officer, the belief is not

unreasonable that if that person is uncooperative, he runs the risk of being shot. However, when a child, who is suspected not of having perpetrated a crime but of being the *victim* of a crime, sits down to be interviewed by a police officer, it is patently absurd to believe that if the child does not cooperate, the officer will shoot her. It is common knowledge that police officers carry firearms; children routinely see armed officers on television, guarding banks, guarding airports. A reasonable person would not believe that an officer would shoot her, a victim, for refusing to answer questions: indeed, the likeliest source of stress for a child in this type of scenario is the desire to still protect the abuser, particularly if that person is a family or household member. Moreover, in the matter *sub judice*, the child victim specifically stated that she was not particularly distressed by the sheriff's presence: she testified that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him. *Id.* at 1017.

The fact that nothing actually happens during an in-school interview to prevent a child from leaving is also a critical factor demonstrating that no seizure has occurred. In *Greene*, the child did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. *Greene*, 588 F.3d at 1017. She made no effort to leave. The sheriff never blocked her exit. Indeed, the record is devoid of any facts which objectively show that anything occurred to actually prevent the victim in *Greene* from leaving. There was no physical restraint whatsoever.

Another important factor is that a victim interview to investigate suspected child abuse only benefits the child. Questioning victims and witnesses to

help solve and prevent crime is not the same as questioning a suspect to prosecute him for a crime. In *Wyman v. James* (1971) 400 U.S. 309, 323, this Court held that home visits by welfare case workers did not implicate the Fourth Amendment because their primary objective was the welfare, not the prosecution, of the recipient. Amici do not suggest the establishment of a paternalistic plan whereby a complaining citizen's constitutional rights may be violated in the name of providing aid. Years ago, Justice Brandeis warned, "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficient." *Olmstead v. United States* (1928) 277 U.S. 438, 479 (dissent). However, the purpose of in-school interviews of suspected child abuse victims is but one factor to be taken into consideration as a whole and the Fourth Amendment ought not to be used blindly as a sword in this very different context.

Finally, the length of an in school interview cannot be ignored. Amici recognize that the type of police questioning approved in *Terry* lasted only minutes. There is clearly a time continuum of a police detention, ranging from minutes to hours, for which a seizure under the Fourth Amendment still may not occur. The length of time is not determinative. Child interviews take time. They should not be rushed. Any experienced interviewer first spends time talking about more comfortable subject matters in order to both get to know the child and gain her trust. Viewed in that context, an hour, even two, does not turn the event into a seizure. An interview that keeps a child at school past the end of the regular school day may be problematic, and even then, not per se a seizure. But an interview conducted during the regular school day, even if

lengthy, is not a seizure. In this case *sub judice*, the interview lasted anywhere from one to two hours during which nothing unusual occurred. *Greene*, 588 F.3d at 1017.

The protections of the Fourth Amendment were intended to protect citizens against state officers who were raiding the homes of colonials in search of smuggled goods, not to prevent police officers from interviewing child victims of suspected abuse in order to help capture the suspect and protect the child. The Ninth Circuit accepted the notion that an interview of a child at school by a police officer is a seizure per se without any analysis. This acceptance was error: an interview of a child at a public school by a police officer regarding suspected child abuse, which does not involve any restraint, is not a seizure per se and does not amount to a seizure reaching constitutional proportions. No seizure occurred here.

CONCLUSION

For the foregoing reasons, this Court should find that the Ninth Circuit's bald acceptance of the notion that an interview of a child at school by a police officer is a seizure per se without analysis was error: an interview of a child at a public school by a police officer regarding suspected child abuse, which does not involve any restraint, is not a seizure and does not violate the Fourth Amendment. Moreover, this Court should find that no seizure occurred in this case.

Respectfully submitted,

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